



November 18, 1999

Ms. Suzanne S. Becker  
Schwartz & Eichelbaum  
700 North St. Mary's, Suite 1850  
San Antonio, Texas 78205

OR99-3315

Dear Ms. Becker:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act ("PIA"). Your request was assigned ID# 129599 and 131197.

The Thrall Independent School District (the "district") received two requests from the same individual for information regarding the district's requests for bids, bids received, contracts, change orders, and inspections. You advise that the request relates to an ongoing construction project of the district. You have submitted representative samples of information you indicate is responsive to the request.<sup>1</sup> You seek to withhold responsive information under sections 552.103 and 552.107 of the Government Code.

Section 552.103(a) excepts from required public disclosure information

relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party[.]

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the

---

<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

governmental body is a party. Open Records Decision No. 588 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You advise that the district is contemplating legal action against the architect on the construction project to which you say the request relates, and have supplied a copy of a demand letter from the district's attorney to the architect. Based on your representations, we believe that you have established that the district reasonably anticipates litigation to which the requested information relates.

Please note, however, that absent special circumstances which you have not shown here, once information has been obtained by the opposing parties to litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). To the extent the opposing party has seen or had access to records, there would be no justification for withholding them from a requestor pursuant to section 552.103(a).

Here, you advise, for example, that the "contract documents" responsive to the request, which you submitted as your exhibit D, were provided to the district by the architect, the "potential defendant." Since the anticipated opposing party has had access to these records, they may not be withheld now under section 552.103(a). Similarly, you advise that the architect "assisted and/or prepared the advertisement and bid tabulations" which you submitted in your exhibit C. To the extent the architect has had access to such material, it may not now be withheld under section 552.103(a). Similarly, some or all of the documents submitted as part of your exhibit F – "Inspection Reports" – appear to have been made available to the architect, and as such are not protected by section 552.103(a).<sup>2</sup> With respect to the other records you have submitted as responsive to the request, you have not advised, and it is not apparent on the face of the records, that the anticipated opposing party in the litigation has had access to them. However, to the extent that the anticipated opposing party has in fact had access to such records, the records may not now be withheld under section 552.103(a).

Similarly, section 552.103(a) does not authorize withholding materials which have already been made available to the public. Open Records Decision No. 436 (1986). Thus, for example, the copies of the district's newspaper advertisements you submitted as part of your exhibit C, are not protected by section 552.103(a).

---

<sup>2</sup>We need not further address whether the exhibit F inspection reports are within the ambit of section 552.103, however, because, as will appear below, we believe that these inspection reports are specifically made public under section 552.022(1) of the act.

We note further that information subject to section 552.022 of the Government Code, as amended in 1999,<sup>3</sup> may not be withheld from disclosure. The amendment applies to governmental body's request for an attorney general decision under the Public Information Act made after September 1, 1999.<sup>4</sup> In pertinent part, section 552.022 now provides

(a) Without limiting the amount or kind of information that public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....  
(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body;

....  
(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body.

Prior to the 1999 amendment to the provisions of section 552.022, this office consistently opined that section 552.022 and its predecessor provisions "did not limit the meaning of other sections of the Open Records Act." *See* Open Records Decision No. 460 (1987) and authorities cited there. Thus, material subject to the pre-amendment version of section 552.022 or its predecessor provisions could be excepted from required disclosure under any of the exceptions in the Public Information Act.

As amended, section 552.022 now requires that "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body" is not excepted from required disclosure unless it is "expressly confidential under other law." Neither section 552.103 nor the other exception you claimed, section 552.107(1), makes any information confidential. Thus, we have marked a bill from a newspaper and other information submitted as part of your exhibit C which we believe must be disclosed pursuant to section 552.022(3). Also, the executed contracts included in the contract documents submitted as your exhibit D, would in our opinion, be subject to the mandatory release provisions of section 552.022(3). Similarly, although the "draft" change order submitted as your exhibit E would not, in our opinion, be subject to section 552.022(3), any final, executed "change orders" must be released because they are, in effect, amendments to "contract[s] relating to the receipt or expenditure of public or other funds by a governmental body." Finally, the Inspection Reports submitted as exhibit F are, in our opinion, "completed reports" specifically made public under section 552.022(1) in the absence of a section 552.108 showing, which you have not made here.

---

<sup>3</sup>See Act of May 25, 1999, 76<sup>th</sup> Leg., R.S., S.B. 1851, §5 (amending Gov't Code § 552.022).

<sup>4</sup>See Act of May 25, 1999, 76<sup>th</sup> Leg., R.S., S.B. 1851, § 36.

Section 552.107(1) protects information “that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.” *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney’s legal advice and confidential attorney-client communications. *Id.* Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege.

In our opinion, you have not established that any of the submitted materials are subject to the section 552.107(1) exception. *See also*, Gov’t Code § 552.301(e)(2) (in seeking attorney general decision under the act, governmental body must “label that copy of the specific information, or of the representative samples, to indicate which exceptions apply to which parts of the copy”).

To summarize, you must release the “Contract Documents” submitted as exhibit D. You must release the “Bidding Documents” submitted as exhibit C. You must also release any other submitted information to the extent the anticipated opposing party in the anticipated litigation has had access to such materials, or to the extent such materials have already been made public (e.g. newspaper advertisements). You must release the Inspection Reports submitted as exhibit F and final, executed “Change Orders,” and other information we have marked under section 552.022. Otherwise, you may withhold the submitted information under section 552.103(a) so long as litigation is reasonably anticipated or pending as discussed above. *See* Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982) (The applicability of section 552.103(a) ends once litigation has concluded).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



William Walker  
Assistant Attorney General  
Open Records Division

WMW/ljp

Ref: ID# 129599

Encl. Submitted documents

cc: Mr. James Norris  
P.O. Box 117  
Thrall, Texas 76578  
(w/o enclosures)